

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

STATE OF MARYLAND, *
*
V * . Case No.: C-10-CR-19-000604/001473/000537
*
ERNESTO TORRES *
*
Defendant *

**DEFENDANT'S MEMORANDUM IN OPPOSITION
TO STATE'S MOTION TO COMPEL UNDER MARYLAND RULE 4-263 (f)**

I. STATEMENT OF THE CASE

The Defendant, Ernesto C. Torres, is currently in pre-trial status on two matters before the Court, Cases C-10-CR-19-000604 and Case C-10-CR-19-001473.

Case C-10-CR-19-000537 is currently in the Circuit Court for Frederick County pursuant to an mandate of remand from the Court of Special Appeals.

On April 21, 2020, the defendant was committed to the custody of the Maryland Department of Health upon a finding that he was not competent to stand trial in case C-10-CR-19-000604 and case C-10-CR-19-001473. The defendant has remained under this commitment since that time. Status hearings have been held on September 17, 2020; October 19, 2021; November 5, 2021; and December 9, 2021. Additionally, an annual review was conducted on April 21, 2021 and a day long competency hearing was conducted on the record on June 23, 2021.

A competency hearing is currently set for February 28, 2022. On February 10, 2022, the State filed *State's Motion to Compel Under Rule 4-263 (f)*, requesting that the Court sign an order compelling the defendant so submit to an interview by a State retained

expert. This memorandum is filed in support of the Defendant's opposition to the State's motion.

II. LEGAL QUESTION PRESENTED

Does the prosecution have the standing to require a defendant to submit to an independent competency evaluation under Maryland Rule 4-263 (f), when the Court has determined the defendant to be incompetent pursuant to Criminal Procedure §3-106, and the defendant has not introduced his mental status as a defense?

III. LEGAL AUTHORITY ON COMPETENCY EVALUATIONS

A. Hartless and Johnson opinions:

The State cites to no Maryland or Supreme Court case to support its position that Maryland Rule 4-263 (f) permits gives a prosecutor's office the right to conduct an independent competency evaluation of a criminal defendant who is has been determined by the Court to be incompetent pursuant to Criminal Procedure §3-106. Indeed, no such authority exists.

However, as the State's cites to Maryland Rule 4-263 (f) (2) as grounds for it's authority to conduct such an evaluation, the Defense would draw the Court's attention to the two Maryland cases contained in the annotations to this rule, both of which discuss scenarios where the State can obtain an independent mental health evaluation of a defendant. Both are cases where the defendant himself placed his mental health status before the court as an affirmative defense. Neither of the cases involved the question of competency proceedings under the Criminal Procedure Article.

In Hartless v. State 327 Md. 558 (1992), the Court of Appeals considered as a matter of first impression whether the language of Maryland Rule 4-263, requiring a defendant to submit to ‘reasonable physical or mental evaluation’ upon request by the State, could be expanded beyond not criminally responsible pleas. In Hartless, the State had filed a “Request for Expert and Alibi Witnesses” pursuant to Maryland Rule 4-263. In response, the defendant disclosed that he intended to call a psychiatrist to opine that the defendant had not formed the specific intent to kill. In reaction to this disclosure, the State filed a motion pursuant to Maryland Rule 4-263 (d) (1)¹ seeking a mental health evaluation of the defendant.

Over the objection of the defendant, the Court granted the State’s motion and the defendant submitted to a mental health evaluation by the State’s chosen expert. The Hartless Court held that ‘unless there are constitutional prohibitions, Rule 4-263 gives a trial judge discretion to grant the State’s request for a mental examination of a defendant who intends to offer psychiatric testimony to show the defendant’s mental status.’ Hartless at 562.

Regarding the defendant’s assertion that such a State ordered examination would infringe upon the defendant’s constitutional rights against self-incrimination and due process, the Hartless Court responded as follows:

‘the underlying concern is that in order for the State to be able to bear effectively its burden of proving guilt, or meeting an affirmative defense, it must have the means to adequately assess and, if necessary, rebut a defendant’s expert psychiatric testimony.’

Hartless at 565

¹ Maryland Rule 4-263 (d) (1) at the time of the Hartless decision in 1992 appears to contain language that mirrors the language of the current Maryland Rule 4-263 (f) (2) (b), i.e. ‘submit to a reasonable physical or mental examination.’

In answering the defendant's constitutional concerns, the Hartless opinion based its holding in part on the fact that "(t)he United States Supreme Court has addressed this concern and supported the concept that a defendant who uses psychiatric testimony as part of a mental status defense waives his right against compelled self incrimination." Hartless at 565, citing to Powell v. Texas 492 U.S. 680, 684 (1989), referencing Estelle v. Smith 451 U.S. 454 (1981) and Buchanan v. Kentucky 483 U.S. 402 (1987).

Johnson v. State 348 Md. 337 (1998) was a capital murder trial. In Johnson, the defendant had disclosed that he intended to introduce evidence of his having a 'substantially impaired' mental state as a mitigating factor for the sentencing. In response, the State sought to obtain a psychiatric evaluation of the defendant under Md. Rule 4-263. The Court, citing Hartless, found that "since Johnson intended to rely at any sentencing hearing on a 'substantially impaired' mental status", the State was entitled to the mental examination. Johnson 347.

B. Competency in Maryland

Once the issue of competency is raised, the Court is obligated to find beyond a reasonable doubt that the defendant is competent for the case to proceed to trial. Roberts v. State 361 Md. 346 (2000); Peaks v. State 419 Md. 239 (2011). Additionally, the Court must resolve any doubt or ambiguity regarding competency in favor of incompetency: "(i)f the hearing judge is simply not persuaded one way or the other by equivocal evidence, even if he is persuaded by a preponderance of evidence that a defendant is competent, or, yet more, he is persuaded clearly and convincingly that a defendant is competent, he still must find the defendant incompetent absent persuasion beyond a reasonable doubt." Longworthy v. State 46 Md. 116, 130 (1980)

The procedure for a competency proceeding outlined in Md. Annotated Code, Criminal Procedure article includes §3-105, which provides legislative safeguards that guarantee that information gathered in a competency evaluation cannot be adversely used against a defendant:

(4) A statement made by the defendant in the course of an examination under this section is not admissible in a criminal proceeding for the purpose of proving the commission of a criminal offense or to enhance the sentence of the defendant.

(5) Except for the purpose of impeaching the testimony of the defendant, a report prepared as the result of an examination under this section is not admissible in a criminal proceeding for the purpose of proving the commission of a criminal offense or to enhance the sentence of the defendant.

Md. Annotated Code, Criminal Procedure §3-105

These procedural safeguards ensure that defense counsel, who is often bringing the issue of competency to the attention of the Court *against* the wishes of the defendant, is not placed in a position of professional conflict. If the legislative protections of Md. Annotated Code, Criminal Procedure § 3-105 did not exist, defense counsel could potentially be placed in a situation where they had to make an election between the following: either raising the issue of incompetency and exposing a client to unknown prosecutorial ramifications, or failing in their obligation to bring the issue of competency to the attention of the Court to ensure that a defendant is not made vulnerable to additional criminal exposure.

III. ARGUMENT

A. Procedural deficiency

The Court should deny the State's Motion to compel on purely procedural grounds: Maryland Rule 4-263 (i) (4) states the following regarding Motions to Compel filed under Maryland Rule 4-263:

The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

As no certificate was attached to the State's motion, it is inappropriate for the Court to consider the Motion on the merits. However, the Defendant addresses the merits contentions below.

B. Legal deficiency

There is no legal authority to support the State's motion. There is statutory authority and there is no case law that permits the State to obtain a competency evaluation of the defendant outside of that permitted by the Criminal Procedure article. If the Maryland General Assembly had intended for the State to be able to seek an independent evaluation on the issue of competency, that language could have been included in the Criminal Procedure article. The absence of any statutory language to support the State's position indicates that Maryland lawmakers did not intend for the government to obtain any evaluations outside of those proscribed.

Cases where the State has been permitted to obtain an independent mental health evaluation under Maryland Rule 4-263 are cases where a competent Defendant chose to put his mental health forward as part of his defense. Competency is not an affirmative defense and the situation of the defendant in this case is clearly distinguishable from both Hartless and Johnson.

The State volunteers in their Motion that “no information provided by the Defendant in an evaluation by Dr. Roskes, compelled by this ORDER, and no information directly or indirectly derived from the information provided, may be used against ERNESTO C. TORRES in any criminal case, except in a prosecution for perjury, obstruction of justice or otherwise failing to comply with the order.” However, while the prosecutors signing this Motion may have authority to make such an assurance regarding the Frederick County State’s Attorney’s Office, they do not have prosecutorial authority beyond their office. As such, they cannot bind other prosecuting entities to not use the material they seek to obtain. The representation that they make is similar to an offer of immunity which would be limited to the jurisdiction that this particular State’s Attorney’s Office possesses.

“Although a prosecutor's promise not to prosecute (having certain attributes of transactional immunity) might, under some emerging theory of equitable estoppel, be judicially enforceable against that prosecutor and those in privity with him in chain of command or line of succession, the legal effect would stop there. That extralegal, even if equitably enforceable, promise would not bind other prosecutors' offices even in the same state, let alone other states or the federal government.”

Butler v. State 55 Md. App. 409, 423 (1983)

Therefore, the promises in the State's Motion not to use the results of Dr. Roskas' potential evaluation are simply deficient to provide constitutional protections to the defendant that are consistent with the protections provided by Criminal Procedure §3-105.

As the State's 'independent expert', Dr. Roskas is a state agent: the State's request is that he be permitted to interview a represented criminal defendant who is pending trial. As this 'interview' would be outside the allowances and protections of the Criminal Procedure article, the defendant's right to remain silent under the Fifth Amendment of the United States Constitution and his right to counsel under the Sixth Amendment of the United States Constitution would be violated. The State has offered no legal authority to counter this statement.

The State's contention that 'the State is hoping a third evaluation will provide the Court and the State with some insight as to whether or not the Defendant is competent' is both curious and hollow. The government has an expert: Dr. Danielle Robinson. The defense has an expert: Dr. Christiane Tellefsen. The State is obviously not satisfied with the finding of the Court that the defendant is not competent. The State would appear to be seeking a 'tie breaker' witness with the desire that such a witness will opine that the accused is competent, that the Court will agree and the matters at issue will proceed to trial.

The determination of competency is not just a numbers game: competency must be decided beyond a reasonable doubt for the matter to proceed to trial. On the issue of competency, the tie breaker is not the number of expert witnesses opining on the issue, but the Court itself, as the ultimate responsibility lies with the Judge to determine if they feel the standard has been met.

IV. CONCLUSION

For the foregoing reasons, the Defendant requests that this Honorable Court grant the following relief:

(a) DENY the State's Motion to Compel under Maryland Rule 4-263 (f);

(b) GRANT the Defendant's Motion for Protective Order to Preclude Prosecutorial Evaluation of the Defendant being filed commensurate with this response.

POINTS AND AUTHORITIES

1. Maryland Rule 4-263
2. Maryland Annotated Code, Criminal Procedure §§3-105; 3-106
3. Buchanan v. Kentucky 483 U.S. 402 (1987)
4. Butler v. State 55 Md. App. 409 (1983)
5. Estelle v Smith 451 U.S. 454 (1981)
6. Hartless v. State 327 Md. 558 (1992)
7. Johnson v. State 348 Md. 337 (1998)
8. Longworthy v. State 46 Md. 116 (1980)
9. Peaks v. State 419 Md. 239 (2011)
10. Powell v. Texas 492 U.S. 680 (1989)
11. Roberts v. State 361 Md. 346 (2000)
12. United States Constitution, Amendments 5 and 6

Respectfully submitted,

ETHRIDGE, QUINN, KEMP,
ROWAN & HARTINGER

By /s/ Margaret A. Teahan

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2022 a copy of the foregoing Defendant's Memorandum in Opposition to State's Motion to Compel was served electronically via the MDEC system on the Office of the State's Attorney for Frederick County via the MDEC e-file and serve system.

/s/ Margaret A. Teahan

Margaret A. Teahan